

No. 86-1463

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

RAY L. CORONA AND RAFAEL L. CORONA, PETITIONERS

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT**

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

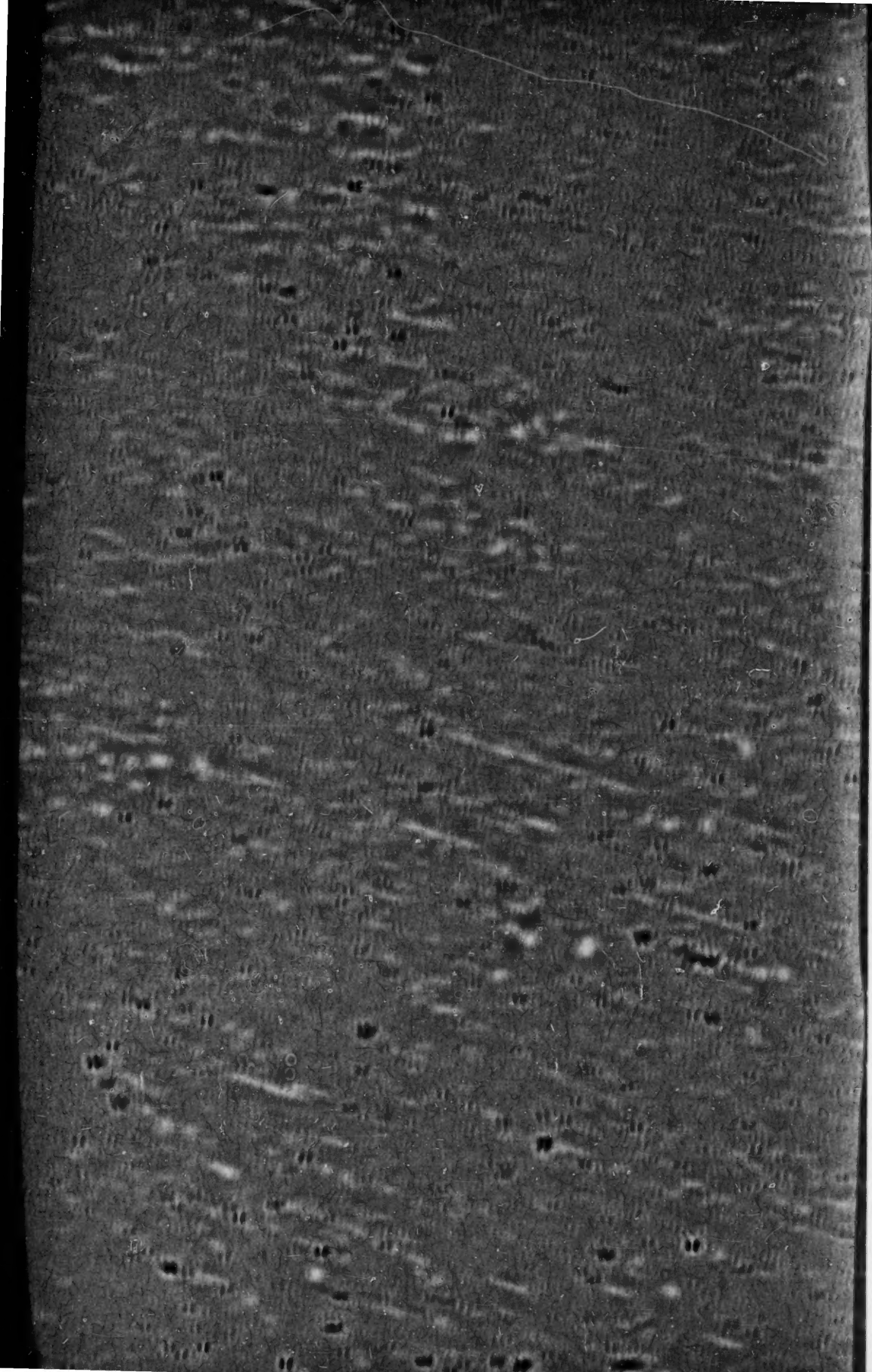
CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SARA CRISCITELLI
Attorney

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

13pp



QUESTION PRESENTED

Whether, following a mistrial due to a hung jury, the retrial of petitioners on a superseding indictment that alters the original charges violates the Double Jeopardy Clause.



TABLE OF CONTENTS

| | Page |
|---------------------|------|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 5 |
| Conclusion | 9 |

TABLE OF AUTHORITIES

Cases:

| | |
|--|------------|
| <i>Arizona v. Washington</i> , 434 U.S. 497 (1978) | 6 |
| <i>Howard v. United States</i> , 372 F.2d 294 (9th Cir. 1967) | 7 |
| <i>Justices of Boston Municipal Court v. Lydon</i> , 466 U.S. 294 (1984) | 5 |
| <i>North Carolina v. Pearce</i> , 395 U.S. 711 (1969) | 5 |
| <i>Richardson v. United States</i> , 468 U.S. 317 (1984) | 4, 5, 6, 7 |
| <i>United States v. Bass</i> , 784 F.2d 1282 (5th Cir. 1986) | 7 |
| <i>United States v. Cerilli</i> , 558 F.2d 697 (3d Cir.), cert. denied, 434 U.S. 966 (1977) | 6-7 |
| <i>United States v. Coia</i> , 719 F.2d 1120 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984) | 8 |
| <i>United States v. Ewell</i> , 383 U.S. 116 (1966) | 6 |

IV

Page

Cases—Continued:

| | |
|---|---|
| <i>United States v. Harris</i> , 542 F.2d 1283 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977) | 7 |
| <i>United States v. Miller</i> , 471 U.S. 130 (1985) | 8 |
| <i>United States v. Perez</i> , 22 U.S. (9 Wheat.) 579 (1824) | 6 |
| <i>United States v. Sonnenschein</i> , 565 F.2d 235 (2d Cir. 1977) | 7 |
| <i>United States v. White</i> , 524 F.2d 1249 (5th Cir. 1975), cert. denied, 426 U.S. 922 (1976) | 7 |

Constitution, statutes, and rule:

| | |
|--|---------------|
| U.S. Const. Amend. V (Double Jeopardy Clause) | 4, 5, 6, 7, 8 |
| 18 U.S.C. 1341 | 2 |
| 18 U.S.C. 1343 | 2 |
| 18 U.S.C. 1952 | 2 |
| 18 U.S.C. 1962(c) | 2 |
| 18 U.S.C. 1962(d) | 2 |
| 21 U.S.C. 952(a) | 2 |
| 21 U.S.C. 963 | 2 |
| Fed. R. Crim. P. 13 | 8 |

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-14) is reported at 804 F.2d 1568.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1986. A petition for rehearing was denied on February 12, 1987 (Pet. App. 15-16). The petition for a writ of certiorari was filed on March 11, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1984, a grand jury sitting in the United States District Court for the Southern District of Florida returned a 30-count indictment charging petitioners and four co-defendants with numerous offenses arising out of a

large-scale scheme to import marijuana.¹ After one of petitioners' co-defendants pleaded guilty, the trial of petitioners and their remaining co-defendants began in August 1985. At the close of its case-in-chief, the government moved to dismiss two counts against petitioner Ray Corona² and one count against both petitioners.³ The district court entered judgments of acquittal on those counts. At the end of the ten-week trial, the jury convicted two of petitioners' co-defendants and acquitted a third. The jury was unable to reach a verdict as to petitioners, and the district court declared a mistrial. Pet. App. 3-6.

¹The indictment charged petitioners, along with co-defendants Jose Fernandez, Gerardo Guevara, Manuel Lopez-Castro, and William Vaughn, with racketeering and racketeering conspiracy, in violation of 18 U.S.C. 1962(c) and (d) (Counts 1 and 2); conspiring to import marijuana, in violation of 21 U.S.C. 952(a) and 963 (Count 3); importing marijuana, in violation of 21 U.S.C. 952(a) (Count 4); the use of interstate facilities to engage in a marijuana smuggling enterprise, in violation of 18 U.S.C. 1952 (Counts 5-22); mail fraud, in violation of 18 U.S.C. 1341 (Counts 23-24); and wire fraud, in violation of 18 U.S.C. 1343 (Counts 25-30). The indictment alleged 48 racketeering acts in support of the substantive racketeering charge, and 94 overt acts in furtherance of the racketeering conspiracy charge. Petitioner Ray Corona was charged in Counts 1-4, 23, and 24. Petitioner Rafael Corona was charged in Counts 1-2, 23, and 24.

The gist of the racketeering and racketeering conspiracy charges was that petitioners and their co-defendants were part of a marijuana smuggling syndicate. The syndicate was engaged in the illegal brokering of multi-ton loads of marijuana imported from Colombia, laundering the drug proceeds through various banks in the United States and the Republic of Panama, and investing the drug proceeds in the acquisition and maintenance of numerous assets in a manner concealing the identities of the true owners of the assets and disguising the source of the funds. See Gov't C.A. Br. 4-6.

²Counts 3 and 4 (conspiracy to import marijuana and importation of marijuana, respectively).

³Count 24 (mail fraud).

In December 1986, the grand jury returned an eight-count superseding indictment. The superseding indictment charged only petitioners.⁴ It did not alter the general allegations contained in the original indictment, although it did modify the original indictment in certain respects.⁵ In sum, the original indictment charged petitioner Ray Corona in six counts, whereas the superseding indictment charged him in seven (four of which were new); the original indictment charged petitioner Rafael Corona in four counts, whereas the superseding indictment charged him in six (three of which were new).

⁴The superseding indictment listed as unindicted co-conspirators former co-defendants Fernandez, Guevara, and Lopez-Castro. The superseding indictment also eliminated references to William Vaughn, who was charged in the first indictment as a co-defendant, but was acquitted by the jury at the first trial.

⁵Counts 1 and 2 of the superseding indictment charged the same racketeering offenses that were contained in the original indictment. Some racketeering acts were deleted from the substantive racketeering count and a few additional ones were added, with an overall reduction in the number of racketeering acts from 48 to 44. Many overt acts were deleted from the racketeering conspiracy charge and some additional ones were added, with an overall reduction in the number of overt acts from 94 to 65. The superseding indictment deleted the marijuana conspiracy count, the substantive marijuana importation count, and one substantive mail fraud count. The new indictment also expanded the dates of the previously alleged racketeering offenses to include allegations of continuing unlawful conduct by petitioners preceding the date alleged in the original indictment (changing January 1977 to mid-1976) and extending beyond the date the first grand jury returned the original indictment. Count 3 of the superseding indictment realleged Count 23 of the original indictment, which charged petitioner Ray Corona with mail fraud. Count 3 also expanded by one month the time frame of the scheme alleged in the original indictment (changing December 1977 to November 1977), and alleged new fraudulent acts. The superseding indictment added two mail fraud counts against both petitioners (Counts 4-5), two interstate travel counts against petitioner Ray Corona (Counts 6-7), and one interstate travel count against petitioner Rafael Corona (Count 8). Finally, all of the substantive offenses in Counts 3-8 were incorporated as acts of racketeering in the racketeering counts.

Before the start of their retrial, petitioners moved to dismiss the superseding indictment on the ground that the Double Jeopardy Clause protected them against being tried on that document. Petitioners argued that the government may not return a superseding indictment once a trial has begun and that, for double jeopardy purposes, their first trial was still "continuing" under the concept of "continuing jeopardy" discussed in *Richardson v. United States*, 468 U.S. 317 (1984). For those reasons, according to petitioners, the government could prosecute them only on the original indictment, and not on the superseding indictment. The district court denied petitioners' motion to dismiss (4/21/86 Tr. 33; 4/21/86 Order Denying Motion to Dismiss), as well as petitioners' motion for a stay of their retrial pending an interlocutory appeal (4/21/86 Tr. 33).

2. The court of appeals stayed petitioners' retrial pending the disposition of their interlocutory appeal (see Pet. App. 6). After hearing the case on the merits, however, the court of appeals upheld the district court's order (*id.* at 2-14). The court determined that petitioners' claim sought to "link[] together two unrelated principles of law" (*id.* at 9)—the notion of "continuing jeopardy" after a mistrial has been declared and the case is set for a retrial (see *Richardson v. United States*, *supra*), and the principle that a superseding indictment cannot be returned against a defendant once trial has begun. The latter rule, the court explained, stems not from the Double Jeopardy Clause, but from the principle that a defendant is entitled to notice of the charges against him before the beginning of his trial (Pet. App. 9-11). That requirement is satisfied in a case such as this one, the court held, as long as the accused has an opportunity to prepare a defense under a superseding indictment before the retrial commences. Thus, the court concluded that "the practical effect of a superseding indictment after a hung jury is no different from one returned with ample time before a trial on the merits" (*id.* at 11).

The court also found (Pet. App. 13) that common sense supports the conclusion that reprosecution on a superseding indictment following a mistrial is not a double jeopardy violation. As the court explained, petitioners could be retried on the original charges, and they could also be tried for the first time on the new charges, even if the jury had returned a verdict at their first trial. The court therefore found that "it makes no sense to argue, as [petitioners] do, that [petitioners], whose trial ended in a mistrial, can be retried on the same charges, and can be retried on completely separate and additional charges, but cannot be retried on some lesser amendment of the existing charges" (*id.* at 13-14 (footnote omitted)).

ARGUMENT

Petitioners do not contend that they may not be retried on the charges contained in the original indictment. Instead, they claim that they may not be retried on the superseding indictment because it amended the charges originally brought against them, even though their trial on the original indictment resulted in a mistrial due to a hung jury. That argument is plainly without substance.

The Double Jeopardy Clause protects a defendant in three different ways: it shields him from having to undergo a reprosecution for the same offense after a conviction or an acquittal; it protects him from being subjected to multiple punishments for the same offense; and it protects him against a retrial when the first trial has been improvidently terminated prior to verdict. See, *e.g.*, *Richardson v. United States*, 468 U.S. 317, 324-325 & n.5 (1984); *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 306-307 & n.6 (1984); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The first two principles have no bearing on this case: the jury at petitioner's first trial did not render a verdict on any charge in the original indictment, and petitioners were not punished for any offense. Although the third principle is

relevant here, it is well settled that a retrial following a mistrial due to a hung jury does not violate the Double Jeopardy Clause. E.g., *Richardson*, 468 U.S. at 317-318; *Arizona v. Washington*, 434 U.S. 497, 509 (1978); *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). That rule is premised on the belief that "the ends of public justice would otherwise be defeated" (*Perez*, 22 U.S. (9 Wheat.) at 580) if the prosecution were denied "one complete opportunity to convict those who have violated [society's] laws" (*Washington*, 434 U.S. at 509) by treating the jury's inability to reach a verdict as the equivalent of an acquittal of the accused. See *Richardson*, 468 U.S. at 324.

The rule is no different when the government seeks to prosecute a defendant on a superseding indictment, rather than on the original indictment. To the extent that the superseding indictment contains the same charges as the original indictment, a properly declared mistrial allows the government to re prosecute the accused on those charges. *Richardson v. United States*, *supra*; *United States v. Perez*, *supra*. Insofar as the superseding indictment presents any new charges on which the accused has never been put in jeopardy, the Double Jeopardy Clause is inapplicable, since the defendant will not be re prosecuted for the "same" offense. *United States v. Ewell*, 383 U.S. 116, 124-125 (1966) (double jeopardy does not forbid a retrial on a new charge following the reversal of the defendant's earlier conviction). At the same time, denying the prosecution the right to bring new charges against the accused would deprive the government of an opportunity to bring a defendant to book for all of his crimes. Accordingly, the courts of appeals have uniformly recognized that the Double Jeopardy Clause is not violated by retrying a defendant, following a properly declared mistrial, on a superseding indictment, even if it modifies or increases the charges against him. *United States v. Cerilli*, 558 F.2d 697, 700-701 (3d Cir.), cert. denied, 434

U.S. 966 (1977); *United States v. White*, 524 F.2d 1249, 1253 (5th Cir. 1975), cert. denied, 426 U.S. 922 (1976); *Howard v. United States*, 372 F.2d 294, 300-301 (9th Cir. 1967); see also *United States v. Bass*, 784 F.2d 1282, 1283 n.2 (5th Cir. 1986); *United States v. Sonnenschein*, 565 F.2d 235, 236 (2d Cir. 1977); *United States v. Harris*, 542 F.2d 1283, 1313-1314 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977).

Petitioners' argument rests on a misinterpretation of this Court's decision in *Richardson v. United States*, *supra*. Although *Richardson* explained that a defendant's jeopardy continues when a trial ends in a hung jury, *Richardson* did not suggest that the trial itself should be regarded as still ongoing. The concept of "continuing jeopardy" expressed in *Richardson* is simply a shorthand way of saying that a defendant may be retried after a properly declared mistrial because his first trial did not result in a final judgment of conviction or acquittal. For double jeopardy purposes, then, a properly declared mistrial, like the one in this case, places a defendant in the same position that he occupied before his first trial began. And, as the court of appeals explained (Pet. App. 9-11), the government may seek the return of a superseding indictment at any time prior to the start of trial.⁶

There is nothing about the superseding indictment in this case that requires special treatment. Most of the differences between the original and superseding indictments are

⁶Petitioner's argument that the government cannot seek a superseding indictment once trial has begun is correct but immaterial to the double jeopardy question in this case. As the court of appeals explained (Pet. App. 9-11), the government may seek a superseding indictment once the trial has begun because a defendant has the right to know the charges against him before trial. That guarantee does not stem from the Double Jeopardy Clause, and petitioners have cited no case remotely suggesting that it does.

trivial,⁷ and none of the remaining changes implicates any double jeopardy concern. For example, while the superseding indictment added some new charges against petitioners, there is nothing objectionable about that. As the court of appeals explained (Pet. App. 13-14 n.2), the government could have sought a separate indictment containing those charges and could have joined both indictments at petitioner's retrial. Fed. R. Crim. P. 13. The superseding indictment also expanded the scope of the racketeering conspiracy and mail fraud charges in the first indictment. But those changes are unobjectionable, since petitioners received ample notice of the revised charges and had not had a final judgment entered on the prior version of those charges. Finally, while the superseding indictment alleged new overt acts committed by petitioners in furtherance of the racketeering conspiracy, that change is of no consequence, since the government need not prove an overt act in furtherance of a racketeering conspiracy to begin with. *E.g.*, *United States v. Coia*, 719 F.2d 1120, 1123-1124 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984). The inclusion of new overt acts in the superseding indictment only benefited petitioners by giving them additional notice of the government's anticipated proof at their second trial.⁸

⁷For the most part, the superseding indictment simply reiterates charges or allegations contained in the original indictment. To that extent, petitioners' argument at most goes not to the substance but to the form of the indictment, which is not a concern of the Double Jeopardy Clause. The superseding indictment also deleted charges relating to petitioners' co-defendants. To that extent, no right of petitioners has been (or could be) violated. In fact, charges in an indictment may be narrowed or dropped at trial itself. *United States v. Miller*, 471 U.S. 130 (1985). Similarly, petitioners have no ground to object to the deletion from the superseding indictment of the charges in the first indictment that were dismissed at petitioners' first trial.

⁸Petitioners complain (Pet. 14) that the court of appeals' ruling allows the government to use a first trial "as a test run of its case." That concern is entirely unjustified. It is absurd to suggest that the government

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SARA CRISCITELLI
Attorney

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manipulated this ten-week trial to obtain a hung jury simply to "test run" its evidence. In fact, petitioners were the likely beneficiaries of the hung jury, since they had a preview of most of the government's case in advance of their retrial, and will therefore be better prepared to challenge the particular aspects of the government's proof.